IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 201

TROJAN POWDER COMPANY,
Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States.

Petitioner, Trojan Powder Company, respectfully prays that a Writ of Certiorari issue to review the final order of the United States Circuit Court of Appeals for the Third Circuit, entered on April 27, 1943, enforcing a final order of the National Labor Relations Board, dated June 26, 1942.

OPINION BELOW.

The opinion of the Circuit Court of Appeals is reported in 135 Fed. 337.

JURISDICTION.

The jurisdiction of the Circuit Court of Appeals was invoked under the provisions of Section 10 (e) of the National Labor Relations Act, (hereinafter referred to as

The Act), 29 U. S. C. A. §160(e). Jurisdiction of this Court to issue the writ sought is provided by the Act, 29 U. S. C. A. §160(e) and by the Act of February 13, 1925, 28 U. S. C. A., §§346, 347.

Designation of Parties.

The petitioner in this Court was the respondent below and the respondent in this Court was the petitioner below. To avoid confusion, we shall refer to the petitioner here as the Powder Company and to the respondent here as the Board.

Statement of the Case.

On or about June 26, 1942, the Board, after a hearing upon an amended charge filed by the United Mine Workers of America, District 50, ordered that the Company cease and desist from "* * *. In any manner interfering with, restraining or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining and other mutual aid and protection, as guaranteed in Section 7 of the National Labor Relations Act." The Board also ordered that notices be posted for a period of 60 days and that compliance be effected within ten days.

The allegations of unfair labor practices within the meaning of Section 8 (5) of the Act were dismissed.

Thereafter, the Board petitioned for the enforcement of the Order; the issues before the Circuit Court of Appeals were:

(a) Whether there is any substantial evidence to support the conclusion of the Board that the actions of the

respondent constituted unfair labor practices prohibited by Section 8 (1) of the Act?

(b) Whether the Board's Order is valid?

(c) If the Board's Order is valid, to what extent may an employer communicate with its employees?

(d) If the Board's Order is valid, should the Court order the issuance of a mandatory injunction the effect of which would be futile because of prior compliance?

On January 18, 1943, the issues were argued before the Circuit Court of Appeals and the opinion of the Circuit Court enforcing the order of the National Labor Relations Board was filed on April 6, 1943. On April 27, 1943, the decree of the Circuit Court of Appeals for the Third Circuit was entered and filed. In its opinion the Circuit Court of Appeals ordered that the Powder Company should:

(1) Cease and desist from interfering with, restraining or coercing its employees in the exercise of their right of self organization, etc., as guaranteed in Section 7 of the Act, and

(2) Post notices and notify the Regional Director that said notices were posted.

It is the Order of the Circuit Court of Appeals, entered on the opinion of Goodrich, C. J., which the Company seeks to review in this Court by writ of certiorari.

Questions Involved.

First: Whether an employer may attempt to influence his employees without violating the Act.

Second: Whether the Board is entitled to an enforcement order by the Circuit Court of Appeals, merely because

the Board has decided the question against the petitioner, *i.e.* was it the intention of Congress that the Court be a mere mechanical device to enforce the will of the Board or must the Circuit Court of Appeals exercise its judicial function by inquiring into the circumstances and the evidence to determine that the Order is supported by substantial evidence?

This question naturally resolves itself into the two following inquiries:

(a) Can the Circuit Court of Appeals properly hold that the facts found by the Board are supported by substantial evidence, if, as held by the Court, "the evidence is capable of the conclusion either in favor of the respondent or against it"?

(b) Can such letters, concerning which the Circuit Court said "* * *. Much of their language is innocuous and indeed, standing by itself, could hardly receive anything but an innocent interpretation. * * *", be considered as a violation of the Act in view of the constitutional guaranty of free speech, contained in the First Amendment of the Constitution of the United States?

THIRD: Whether an employer is entitled to know from exactly what acts he is restrained, *i.e.* if a person is ordered to "cease and desist" from doing something the presupposition is that prior to the order the person did whatever he was ordered to cease and desist from doing. Therefore, is not the person entitled to know exactly what he is ordered to cease and desist from doing?

Reasons for Granting the Writ.

The decision of the Court of Appeals in the case at bar is in direct conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *N. L. R. B.* v. *American Tube Bending Company*, 134 F. 2d 993.

Although there was a series of letters written by the Company, the last letter which contained the so-called "anti-strike pledge" appears to be the only letter in which the Court of Appeals found any questions (cf. Page 339 of reported Opinion). Therefore, from its facts, the *American Tube Bending Company* case is parallel to the case at bar, and the result is opposite. The *American Tube Bending Company* case has not been disapproved or overruled by this Court.

In the *American Tube Bending Company* case the Court relied upon *N. L. R. B.* v. *Virginia Electric & Power Company*, 1941, 314 U. S. 469, to support its holding that the letter and speech were not prejudicial to the employees' rights of collective bargaining.

In this case, the Court of Appeals relied upon *N. L. R. B.* v. *Virginia Electric & Power Company, supra,* only as authority for the contention that the statute gives to the Board responsibility of fact finding. It is true that the statute gives to the Board the responsibility of fact finding, but the statute makes the Board's findings of facts conclusive only when said facts are based on substantial evidence. *Midland Steel* v. *N. L. R. B.*, 1940, 113 F. 2d 800, 805.

The Board held that the Powder Company interfered with, restrained and coerced its employees but based the finding of fact upon what the Circuit Court of Appeals held as "innocuous statements". This so-called finding of fact by the Board is no more than a conclusion based on the inference that the innocuous statements were interference,

restraint or coercion. In order for the Court to be bound by the conclusion the inference must be based upon substantial evidence.

This Court has held that substantial evidence means "* * * such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 229, 230.

It does not mean that because there is testimony that a certain event took place, necessarily such event did take place. It means that the burden has been sustained by the Board only when there has been such evidence as would prevent a Court from dismissing a complaint or directing a verdict in a trial before a jury. *N. L. R. B.* v. *Columbian Enameling & Stamping Co.*, 306 U. S. 292, 299, 300. *N. L. R. B.* v. *Thompson Products*, 97 F. 2d 13, 15.

In the present case the Court of Appeals stated (page 339 of the reported opinion) that the Act "'precludes an independent determination of the facts.' National Labor Relations Board *v.* Virginia Electric & Power Co., 314 U. S. 469, 476 (1941)." It then went on to say

> "* * *. We cannot say that the facts outlined above are incapable of sustaining the conclusion found by the Board. The evidence is capable of a conclusion either in favor of the respondent or against it. The Board has concluded against it. We have no authority to interfere with that finding."

Such reasoning is in conflict with the holdings of this Court in *Consolidated Edison Company* v. *N. L. R. B.* and *N. L. R. B.* v. *Columbian Enameling & Stamping Co.* (*supra*).

Indeed, it is entirely contradictory to a holding of the same Court made in 1941 in *Quaker State Oil Refining Corporation* v. *N. L. R. B.*, 119 F. 2d 631. In that case while discussing the meaning of the words substantial evidence the Court said at page 632:

> "* * *. Certain it is, however, that we must analyze the evidence and determine its weight to the extent which may be necessary to decide whether it is evidence which 'a reasonable mind might accept as adequate to support a conclusion,' (1) and which affords 'a substantial basis of fact from which the fact in issue can be reasonably inferred,' (2) and not merely evidence which creates a suspicion or gives equal support to inconsistent inferences."

In view of the above how can it now be held that evidence, which is capable of inconsistent conclusions, is substantial evidence?

The question involved is one of great public importance, and there is pressing need for final determination of the matter by the Supreme Court. We need not labor this point; the magnitude of the importance is shown by the fact that without a decision by this Court the respondent as well as every other employer has no knowledge of what may be done by it under the doctrine of free speech or what communications, the language of which may be "innocuous", it may address to its employees. Unless this Court grants this petition, this employer may not properly communicate either verbally or in writing with its employees on any matter pertaining to their employment, because even an "innocuous" statement would be in violation of the decree of the Court of Appeals.

Respectfully submitted,

TROJAN POWDER COMPANY,

By A. V. CHERBONNIER,
KENNETH SOUSER,
ROBERT A. LILLY,
Counsel for Petitioner.

New York, New York, July 26, 1943.

I hereby certify that I have examined the foregoing petition, that in my opinion it is well founded and entitled to favorable consideration of this Court, and that it is not filed for the purpose of delay.

A. V. CHERBONNIER.

New York, New York, July 26, 1943.

BRIEF IN SUPPORT OF PETITION.

The facts and the proceedings have been set out in the petition and will not be repeated herein.

The Powder Company admits at the outset that it attempted by means of its letters to "influence" its employees. It did this without making any threat and it does not believe that the language used contained any threat, expressed or implied. Indeed the Court of Appeals stated in its opinion at page 339:

> "* * *. They are carefully worded; certainly there is no threat explicit in the language used. * * *"

But then the Court attempted to sustain the Board's contention by stating, page 339:

> "* * *. The last letter, which called for the no strike statement, is certainly capable of being understood to suggest that unless such statement were forthcoming from the employee group there would be no new work at the plant, even though the words are chosen with a fine sense of Victorian delicacy."

The later statement is made by the Circuit Court even though there was no testimony to substantiate the interpretation placed upon the letter by the Board and the Circuit Court. Admittedly all the letters were sent in an attempt to "influence" the employees but such action is not an unfair labor practice. *Midland Steel Products Co.* v. *N. L. R. B.*, 1940, 113 F. 2d 800, 803; *Texas & New Orleans Rd. Co.* v. *Brotherhood of Railway & Steamship Clerks*, 1930, 281 U. S. 548, 568.

As the Court said in *Midland Steel Products Co.* v. *N. L. R. B.*, at page 803:

> "* * *. That a letter more strongly phrased than this one might 'influence' some employee in favor of individual conferences is possible; but such influence in and of itself does not violate the applicable section of the statute, which only prohibits interference, restraint or coercion. Not every kind of influence amounts to compulsion. * * * "

The Congressional History of the National Labor Relations Act shows that although the word "influence" was contained in the original Act submitted by Senator Wagner (Senate Bill No. S. 2926, March 1934, Section 5), that word was deleted after Congressional consideration. When the Act was passed in 1935 the word "influence" was not contained in it as an unfair labor practice.

In the second from the last paragraph of its opinion (p. 339) the Circuit Court of Appeals states that it is precluded by the statute from making an independent determination of the facts. In this statement the Circuit Court erred. The statute precludes the Court from making an independent determination of the facts when the facts are "supported by evidence, * * *." This Court has determined that this language means "substantial evidence", and has defined substantial evidence. *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 229, 230; *N. L. R. B.* v. *Columbian Enameling & Stamping Co.*, 306 U. S. 293, 299, 300. The holding of the Circuit Court of Appeals, in view of its statement that "The evidence is capable of a conclusion either in favor of the respondent or against it.", is in conflict with the law as stated in the *Consolidated Edison Co.* and *Columbian Enameling* cases.

Indeed the statement in the present case is contrary to a statement of the same court in *Quaker State Oil Refining Corporation* v. *N. L. R. B.*, 119 F. 2d 631, 632, at which place the Court stated:

> "* * * Certain it is, however, that we must analyze the evidence and determine its weight to the extent which may be necessary to decide whether it is evidence which 'a reasonable mind might accept as adequate to support a conclusion', (1) and which affords 'a substantial basis of fact from which the fact in issue can be reasonably inferred,' (2) and not merely evidence which creates a suspicion or gives equal support to inconsistent inferences."

As a result of the order of the Circuit Court the Powder Company has been ordered to cease and desist from interfering with, restraining or coercing its employees in the exercise of their right of self-organization as guaranteed by Section 7 of the Act. In truth the Powder Company made "innocuous" statements to its employees and under the decree of the Circuit Court of Appeals it is restrained therefrom. Therefore the effect of this order is to prevent the Company from communicating with its employees by letter or other means.

This follows logically because the Circuit Court on page 338 of the reported opinion found that the language used was "innocuous" and that standing by itself it "could hardly receive anything but an innocent interpretation." However, because of an alleged background, a meaning entirely outside of the language of the letters was attached to them. If the background of 1936 can be used as the basis of making an interpretation of language used in 1941, such background can thereafter be used on any occasion that the Powder Company communicates with its employees, whether orally or in writing, regardless of the language used, because innocent and non-coercive words magically become coercive when considered by the National Labor Relations Board in the light of a 1936 background. Under the decree of the Circuit Court of Appeals the

Powder Company hereafter making an innocuous statement to its employees would be in contempt of the Court's decree because the so-called "background" can not be dis-associated. Therefore, under the decree of the Circuit Court of Appeals, the only safe course for Powder Company is not to communicate with its employees at any time concerning any matters involving the employees' employment. In other words, Powder Company is being restrained from properly communicating with its employees or expressing to them any views whatsoever. Such a holding is in violation of the Petitioner's right of Free Speech as guaranteed by the First Amendment of the Constitution, for which right, now known as one of the "Four Freedoms", the youth of this country is shedding its blood. *Thornhill* v. *Alabama*, 1939, 310 U. S. 88, 95, 96; *Schneider* v. *State* (*Town of Irvington*), 1939, 308 U. S. 147, 161; *N. L. R. B.* v. *Ford Motor Co.*, 1940, 114 F. 2d 905, 914, 915; *Midland Steel Products Co.* v. *N. L. R. B., supra.* In *Schneider* v. *State, supra,* at page 161, this Court said:

> "In every case, therefore, where legislative abridgement of the rights [freedom of speech and of the press] is asserted, the courts should be astute to examine the effect of the challenged legislation."

In *Continental Box Co.* v. *N. L. R. B.*, 113 F. 2d 93, the Court said at page 97:

> "* * *. The constitutional right of free speech (Const. amend. 1) in regard to labor matters is just as clearly a right of employers as of employees, and if the Act purported to take away this right, it could not stand." Cases cited.

Nor can it be said that the Petitioner has the right of Free Speech if it is subject to being in contempt of Court

on every occasion on which it seeks to communicate with its employees. In *N. L. R. B.* v. *Falk Corp.*, 1939, 102 F. 2d 383, (reversed on other grounds, 308 U. S. 453) the Court of Appeals said at page 389:

> "On the other hand, the position of the employer is a most delicate one. Surely he has the right to his views. And the right to entertain views is rather valueless if it be not accompanied by the right to express them."

We respectfully submit, therefore, that for the reasons stated in the petition and in this brief, this Court should grant a writ of certiorari and review the highly important questions that are here involved.

Respectfully submitted,

A. V. Cherbonnier,
Kenneth Souser,
Robert A. Lilly,
Counsel for Petitioner.

New York, N. Y., July 26, 1943.

No. 201

In the Supreme Court of the United States

OCTOBER TERM, 1949

THOMAS [illegible]

v.

NA[illegible]

ON PETITION [illegible]
STATES [illegible]
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BRIEF FOR [illegible]

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 201

TROJAN POWDER COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 92–97) is reported in 135 F. (2d) 337. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 5–27) are reported in 41 N. L. R. B. 1308.

JURISDICTION

The decree of the court below (R. 97–98) was entered on April 27, 1943. The petition for a writ of certiorari was filed on July 26, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the

Act of February 13, 1935, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether there is substantial evidence supporting the findings of the Board, which were sustained by the court below, that petitioner by oral antiunion statements of its supervisors and by a series of letters to its employees which threatened a curtailment of work in the event of continued union activity, interfered with, restrained and coerced its employees in violation of Section 8 (1) of the Act.

2. Whether petitioner is privileged by virtue of the First Amendment thus to interfere with, restrain, and coerce its employees in the exercise of their right to self-organization.

3. Whether the order of the Board which required petitioner to cease and desist from interfering with, restraining or coercing its employees in the exercise of their right to self-organization was sufficiently definite to be valid.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*) are set forth in the Appendix, *infra,* p. 17.)

STATEMENT

Upon the usual proceedings under Section 10 of the Act (R. 5–7), the Board issued its findings of

fact, conclusions of law, and order (R. 5–27). The facts, as found by the Board and as shown by the evidence, may be summarized as follows:[1]

In August 1936 the American Federation of Labor attempted to organize the employees of petitioner's Seiple, Pennsylvania, plant who theretofore had been unorganized (R. 8; 38, 43–44). Petitioner, by means of both written and oral threats, coerced its employees to abandon their organizational efforts (R. 8–11; 37–38, 43–46, 54–63). It sent a series of letters to its employees which stressed the necessity for their loyalty; spoke of petitioner's plans to increase the earnings of its "loyal" employees; pointed out that "internal dissension and bickering" would diminish petitioner's efforts in this direction; and questioned whether it would be "practicable" for petitioner to embark upon its program "unless it is assured of the full cooperation of its employees" (R. 8; 37–38, 43–44, 54–59). Near the end of this series of letters petitioner solicited its employees to execute individual pledges not to participate in "any labor disturbance of any sort" (R. 8–9; 60–61). At the same time Boyd, petitioner's assistant director of research, attempted to dissuade an employee who was an officer in the A. F. of L. from his union activities, intimating that he would be discharged if he persisted in them (R. 10; 43–

[1] In the following statement the citation preceding the semicolon refers to the Board's findings; those following refer to the supporting evidence.

46). As a result of petitioner's coercion "practically all" of the employees signed the pledge as requested, and petitioner thus succeeded in eliminating all union activity in its plant for five years (R. 9, 11, 17; 43, 62).

In the latter part of 1940 or early 1941 the C. I. O. appeared, conducted an organizational campaign, and on April 8, 1941, asked petitioner to recognize it as the employees' bargaining agent (R. 11–12; 30–33). Petitioner replied to this request by issuing to its employees a second series of letters, "strikingly similar to the 1936 series" (R. 12; 38, 64–71). The opening letter of this series was sent to the employees on April 8, the very day on which the C. I. O. first sought recognition (R. 12; 38, 64–65). In this letter, petitioner warned its employees that "only the employer * * * can supply jobs. * * * For anyone but an employer to claim that he can provide jobs or job security is nonsense"; stressed that "no one need join any organization of any sort in order to have a job or enjoy security with us"; and asserted that "those who may say anything to the contrary are really advocating job insecurity" (R. 12–13; 64–65).[2]

[2] The letter also announced an immediate increase in employee bonuses and contained other suggestive statements, as, for example, "your future security rests chiefly in your own hands because the loyalty of the Company to you will always at least equal your loyalty to the Company and it is the Company which * * * provides the jobs" (R. 65).

On April 9th and 10th petitioner distributed to the employees letters offering, as inducements for their "full cooperation," job security and increased compensation and warning them that any course other than "carrying on with confidence under the tried and experienced management" which had brought about their present benefits "could endanger the very existence of the business" (R. 12–13; 66–68). On April 14, the day before a meeting scheduled with the C. I. O. representative to discuss the request for collective bargaining, petitioner sent to each of its employees an individual letter promising steady work, announcing a bonus increase and setting forth the minimum sum to which the particular bonus of the employee addressed would amount, the figures varying in each of the letters (R. 14–15; 69–71). Attached to the letters was the following form which each employee was asked to sign and return (R. 14–15; 69–71):

> In consideration of the above, I hereby state that during the period ending December 31, 1941, I intend to work steadily without interruption except (sic) for absences for such things as sickness and the like. I realize that the statements which have been made by the Company to me depend for their fulfilment upon the carring (sic) out of my intention to work without interuption (sic) as stated above.

The petitioner made certain that these individual no-strike pledges would be signed by warn-

ing the employees in its covering letter that their response to the pledges would determine what work petitioner would seek and undertake, and indicating that a failure to sign the pledges might thus deprive them of continued work, since it would be "impracticable" for petitioner to commit itself to do important and necessary work if there were any possibility whatever of interruption of operations at the plant (R. 14–15; 69–71).

The statements in the letters were amplified by the contemporaneous statements of petitioner's supervisory employees. General Foreman Koch called employees from their work, directed their attention to the April 8th letter, which he said they would receive that night, reiterated its statement that they need not join a labor organization to work for petitioner, and cautioned them against being coerced into joining the C. I. O. by statements that it would cost them more to do so later (R. 15–16; 44, 47–48). Likewise Plant Superintendent Bronstein called one employee's attention to the April 14th letter, stressed its assurance that the employees did not have to join an organization to have job security, and asked him if he had attended union meetings (R. 16; 50–51). Assistant Research Director Boyd repeated to groups of employees the letters' warning that petitioner expected its loyalty to them to be returned (R. 16; 43, 48–49). Foreman Forgan told some of the employees that "all the C. I. O. leaders" were

"sabotagers" trying to bring about the loss of the war by obtaining control of defense plants for the purpose of calling strikes (R. 16; 43, 49–50).

On April 25th, although the C. I. O. had meanwhile protested the April 14th letter, petitioner again wrote its employees and thanked them for their "substantially unanimous" response in signing the individual pledges (R. 16–17; 35–37, 72).

Because the complaint alleged only the conduct of petitioner in 1941 as unfair labor practices and evidence respecting the incidents in 1936 was introduced solely as background, the Board used its findings respecting the 1936 conduct solely as an aid to judging the intent and effects of the 1941 conduct. With respect to the latter, the Board concluded (1) that petitioner, by appealing to the loyalty of its employees, emphasizing the benefits which it granted them unilaterally, and indicating that security and wage increases depended upon its good will, intended to and did discourage union membership; (2) that it impliedly threatened the employees that their persistence in union or concerted activities might result in a curtailment of work at the plant; (3) that by exacting an assurance from each employee that he would not engage in any work stoppage in exchange for steady employment and increased wages, petitioner imposed a limitation upon the right to engage in concerted activities which, in effect, compelled a choice between continued work and union membership; and

(4) that, in view of all the circumstances surrounding petitioner's course of antiunion conduct, as evidenced by the letters and statements, such conduct constituted interference, restraint and coercion within the meaning of the Act. (R. 18–19).[3] Upon these findings, the Board ordered petitioner to cease and desist from its unfair labor practices (R. 24–25).

On November 6, 1942, the Board petitioned the court below for enforcement of its order (R. 72–74) and on April 6, 1943, the court handed down its unanimous opinion enforcing the Board's order without modification (R. 92–97). On April 27, 1943, a decree was entered in conformity with the opinion (R. 97–98).

ARGUMENT

1. Petitioner's contention (Pet. 5–7, 10–11) that the Board's findings that petitioner interfered with, restrained, and coerced its employees, are not supported by substantial evidence, presents no question of general importance. The Board found, and the court below upheld the finding, that the letters sent to the employees and the statements made to them by supervisory employees in 1941 were intended to constitute, and

[3] Although the complaint alleged that petitioner had refused to bargain in violation of Section 8 (5), the Board found that the Union had not been designated by a majority of the employees in the appropriate unit at the time of the alleged refusal and accordingly dismissed the complaint with respect to this allegation (R. 19–23).

were understood by the employees to constitute, threats of economic reprisal if union activities continued (R. 18, 95–96). Petitioner's repeated suggestions to its employees that security of employment, wage increases, and continued work depended upon the petitioner's good will and that its good will would be alienated by concerted activity (*supra*, pp. 4–5) could not be construed in any other manner than as implied threats. The fact that these threats were not explicit but rather appeared in veiled form does not, as petitioner assumes (Pet. 9–10), reduce them to mere influence. Threats of an employer that he will treat his employees less advantageously if they engage in organizational activities than he would otherwise treat them, violate the Act regardless of the form in which they are conveyed. No court has ever questioned this. And the courts have uniformly upheld the Board in finding threats implicit in the sort of statements made in the instant case.

Indeed, the phrases in which petitioner couched its utterances recur frequently in antiunion drives and have often been the subject of notice by the courts. Thus, appeals to employees for their "loyalty" and "cooperation" issued at the opening of a union organizational campaign, such as those in the letters of April 9th and 10th and the statement of Supervisor Boyd (*supra*, p. 16), have been held to constitute interference, restraint, and coercion in violation of Section 8

(1).[4] Similarly, statements such as petitioner's suggestion that the employees' failure to grant this "cooperation" by abandoning collective activity "could endanger the very existence of the business" (*supra*, p. 5),[5] and the gratuitous assurance that it was unnecessary to join a union to hold a job, contained in the April 8th letter and emphasized by petitioner's supervisors Koch and Bronstein (*supra*, pp. 4, 6),[6] have frequently been held coercive interference by an employer. This

[4] *National Labor Relations Board* v. *Federbush Co.*, 121 F. (2d) 954, 955 (C. C. A. 2); *Republic Steel Corp.* v. *National Labor Relations Board*, 107 F. (2d) 472, 474 (C. C. A. 3); *National Labor Relations Board* v. *Clarksburg Pub. Co.*, 120 F. (2d) 976, 978–979 (C. C. A. 4); *National Labor Relations Board* v. *Jahn & Ollier Engraving Co.*, 123 F. (2d) 589, 591 (C. C. A. 7).

[5] *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 76; *National Labor Relations Board* v. *American Manufacturing Co.*, 106 F. (2d) 61, 67 (C. C. A. 2); *Atlas Underwear Co.* v. *National Labor Relations Board*, 116 F. (2d) 1020 (C. C. A. 6); *Hobart Cabinet Co.* v. *National Labor Relations Board*, decided May 8, 1942 (C. C. A. 6), certiorari denied, 314 U. S. 679; *National Labor Relations Board* v. *W. A. Jones Foundry Co.*, 123 F. (2d) 552, 553 (C. C. A. 7).

[6] *Corning Glass Works* v. *National Labor Relations Board*, 118 F. (2d) 625, 628 (C. C. A. 2); *National Labor Relations Board* v. *Elkland Leather Co.*, 114 F. (2d) 221, 223 (C. C. A. 3), certiorari denied, 311 U. S. 705; *National Labor Relations Board* v. *General Motors Corp.*, 116 F. (2d) 306, 309 (C. C. A. 7); *National Labor Relations Board* v. *Goshen Rubber & Mfg. Co.*, 110 F. (2d) 432, 434 (C. C. A. 7); *National Labor Relations Board* v. *Jahn & Ollier Engraving Co.*, 123 F. (2d) 589, 591 (C. C. A. 7); *North Whittier Heights Citrus Assn.* v. *National Labor Relations Board*, 109 F. (2d) 76, 78 (C. C. A. 9), certiorari denied, 310 U. S. 632.

is also true of petitioner's unilateral offers of job security and increased compensation which appear throughout the whole series of letters (*supra*, pp. 4–5).[7] The effort to abstract from the employees individual no-strike pledges (*supra*, pp. 5–6) at a time when their collective representative was seeking to use such an agreement as a bargaining factor (Tr. 55, Bd. Exh. 4) also constitutes the very type of conduct proscribed by the Act.[8] Foreman Forgan's verbal assault upon the C. I. O.'s leaders as saboteurs (*supra*, pp. 6–7) exemplifies the practice by antiunion employers of characterizing unions and their officers as subversive.[9]

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[7] *National Labor Relations Board* v. *Somerset Shoe Co.*, 111 F. (2d) 681, 688 (C. C. A. 1); *National Labor Relations Board* v. *George P. Pilling & Son Co.*, 119 F. (2d) 32, 35–36 (C. C. A. 3); *Great Southern Trucking Co.* v. *National Labor Relations Board*, 127 F. (2d) 180, 184 (C. C. A. 4); *National Labor Relations Board* v. *Sunbeam Electric Mfg. Co.*, 133 F. (2d) 856, 861 (C. C. A. 7).

[8] *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 353; *National Labor Relations Board* v. *Acme Air Appliance Co.*, 117 F. (2d) 417, 420 (C. C. A. 2); *National Labor Relations Board* v. *Superior Tanning Co.*, 117 F. (2d) 881, 885–888 (C. C. A. 7); *National Labor Relations Board* v. *Stone*, 125 F. (2d) 752, 753–755 (C. C. A. 7), certiorari denied, 317 U. S. 649.

[9] *North Carolina Finishing Company* v. *National Labor Relations Board*, 133 F. (2d) 714, 716 (C. C. A. 4); *Oughton* v. *National Labor Relations Board*, 118 F. (2d) 486, 489 (C. C. A. 3), certiorari denied, 315 U. S. 797; *Reliance Mfg. Co.* v. *National Labor Relations Board*, 125 F. (2d) 311, 314 (C. C. A. 7); *Rapid Roller Co.* v. *National Labor Relations Board*, 126 F. (2d) 452, 456 (C. C. A. 7), certiorari denied, 317 U. S. 650.

The Board's finding that the 1941 statements were coercive in character is likewise supported by the evidence that in 1936 petitioner used a substantially similar series of letters and supervisory statements to frustrate the A. F. of L.'s organizational attempt (*supra*, p. 3). In both instances petitioner appealed to the loyalty of its workers, offered them inducements for such loyalty, threatened them with reduced employment if they failed to display it, and secured individual signed assurances against concerted action. The Board's ultimate findings were based only upon petitioner's 1941 activities (R. 11), but it properly took into consideration the resemblance between its original means of meeting employee organization and the conduct which followed the C. I. O.'s appearance.[10] Thus there was an abundance of evidence before the Board when it concluded that "in view of all the circumstances surrounding [petitioner's] course of antiunion conduct as evidenced by the letters and statements * * * such conduct constituted interference, restraint, and coercion within the meaning of the Act" (R. 19).

2. Petitioner's contention (Pet. 4, 7, 12) that this case involves the issue of free speech under the First Amendment is, we submit, without merit. The facts set forth (*supra*, pp. 3–7) show that the Board was fully justified in concluding

[10] *National Labor Relations Board* v. *Pacific Greyhound Lines*, 303 U. S. 272, 274; *National Labor Relations Board* v. *Yale & Towne Mfg. Co.*, 114 F. (2d) 376, 379 (C. C. A. 2); also cases cited *infra*, p. 14, n. 14).

that petitioner's whole course of conduct constituted interference, restraint, and coercion. Such conduct is not constitutionally privileged merely because it involves the use of oral or written statements. As this Court has said, "conduct, though evidenced in part by speech, may amount, in connection with other circumstances, to coercion within the meaning of the Act." *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469, 477.[11] Here the Board was clearly justified in finding that, in view of the inequality of the bargaining powers of the parties,[12] the timing of the individual appeals whereby petitioner admittedly sought to "influence" its employees (Pet. 9),[13] and the pattern established

[11] See also *National Labor Relations Board* v. *Chicago Apparatus Co.*, 116 F. (2d) 753, 756–757 (C. C. A. 7); *National Labor Relations Board* v. *Baldwin Locomotive Works*, 128 F. (2d) 39, 50 (C. C. A. 3); *National Labor Relations Board* v. *New Era Die Co.*, 118 F. (2d) 500, 505 (C. C. A. 3). Cf. *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 599; *National Labor Relations Board* v. *Federbush Co.*, 121 F. (2d) 954, 957 (C. C. A. 2); *National Labor Relations Board* v. *M. A. Hanna Co.*, 125 F. (2d) 786, 790 (C. C. A. 6; *National Labor Relations Board* v. *Schaefer-Hitchcock Co.*, 131 F. (2d) 1004, 1007–1008 (C. C. A. 9).

[12] "The position of the employer * * * carries such weight and influence that his words may be coercive when they would not be so if the relation of master and servant did not exist." *National Labor Relations Board* v. *Falk Corp.*, 102 F. (2d) 383, 389 (C. C. A. 7); see also *Federbush* case, *supra*, note 11, pp. 956–957; *National Labor Relations Board* v. *Griswold Mfg. Co.*, 106 F. (2d) 713, 722 (C. C. A. 3).

[13] *National Labor Relations Board* v. *American Mfg. Co.*, 106 F. (2d) 61, 65–66 (C. C. A. 2); *National Labor Relations Board* v. *Stone*, 125 F. (2d) 752, 756 (C. C. A. 7), certiorari denied, 317 U. S. 649.

by its prior use of the same device,[14] the conduct of the employer amounted to coercion. Thus, the Board's order may fairly be said to be based on the totality of petitioner's activities during the period in question in the light of which its statements plainly became coercive. See *Virginia Electric & Power* case, 314 U. S. at pp. 476 and 479. Accordingly these acts, "considered not in isolation but as part of a pattern," do not involve a question of free speech under the First Amendment. *Virginia Electric & Power Co.* v. *National Labor Relations Board,* decided June 7, 1943, No. 709, last Term, pamphlet, p. 5.

Under like circumstances the courts have consistently held, as did the court below, that no issue of free speech is raised. See *National Labor Relations Board* v. *M. A. Hanna Co.,* 125 F. (2d) 786, 790 (C. C. A. 6); *National Labor Relations Board* v. *Stone,* 125 F. (2d) 752, 755–756 (C. C. A. 7), certiorari denied, 317 U. S. 649; *National Labor Relations Board* v. *Sunbeam Electric Mfg. Co.,* 133 F. (2d) 856, 860–861 (C. C. A. 7); *Gamble-Robinson Co.* v. *National Labor Relations Board,* 129 F. (2d) 588, 591 (C. C. A. 8). Similar contentions by employers in many recent petitions for certiorari have been rejected.[15]

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[14] *National Labor Relations Board* v. *Link-Belt Co.,* 311 U. S. 584, 588; *National Labor Relations Board* v. *National Seal Corp.,* 127 F. (2d) 776, 778 (C. C. A. 2); *National Labor Relations Board* v. *American Mfg. Co.,* 106 F. (2d) 61, 68 (C. C. A. 2).

[15] *National Labor Relations Board* v. *Bank of America,* 130 F. (2d) 624 (C. C. A. 9), certiorari denied, 318 U. S. 791,

The decision below does not involve a conflict with *National Labor Relations Board* v. *American Tube Bending Co.*, 134 F. (2d) 993 (C. C. A. 2), petition for certiorari pending, No. 334, present Term. The presence of testimony respecting labor relations at petitioner's plant for a period of more than five years, the testimony of numerous witnesses respecting speeches, statements, and inquiries of various supervisory employees, as well as the documentary evidence of letter after letter containing only slightly veiled threats, afforded a more extensive record of employer interference than in the *American Tube Bending* case, which turns on a pre-election letter and speech of the company's president. We believe that decision to be erroneous and regard it as of large importance; but we cannot conclude that the Circuit Court of Appeals for the Second Circuit would have felt bound to decide the present case in the same way.

3. Petitioner contends that the Board's order is improper since an employer is entitled "to know from exactly what acts he is restrained" (Pet. 4).

792; *North Electric Mfg. Co.* v. *National Labor Relations Board*, 123 F. (2d) 887 (C. C. A. 6), certiorari denied, 315 U. S. 818; *Norristown Box Co.* v. *National Labor Relations Board*, 124 F. (2d) 429 (C. C. A. 3), certiorari denied, 316 U. S. 667; *National Labor Relations Board* v. *Elkland Leather Co.*, 114 F. (2d) 221 (C. C. A. 3), certiorari denied, 311 U. S. 705; *National Labor Relations Board* v. *American Manufacturing Co. of Texas*, 132 F. (2d) 740 (C. C. A. 5), certiorari denied, No. 852, last Term.

What Congress meant by "interference" and "coercion" is clear and these terms refer to "well understood concepts of the law." *Texas and N. O. Railroad Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548, 568. It is well settled that an employer who has been found to have violated Section 8 (1) of the Act by interfering with, restraining or coercing its employees may properly be ordered to cease and desist therefrom. *National Labor Relations Board* v. *Express Publishing Co.,* 312 U. S. 426; *Ford Motor Co.* v. *National Labor Relations Board,* 114 F. (2d) 905, 916 (C. C. A. 6), certiorari denied, 312 U. S. 689; *National Labor Relations Board* v. *Swift & Company,* 108 F. (2d) 988, 990 (C. C. A. 7); *National Labor Relations Board* v. *Sunbeam Electric Mfg. Co.,* 133 F .(2d) 856, 861–862 (C. C. A. 7).

CONCLUSION

The decision below is correct and presents no conflict of decisions. The petition should therefore be denied.

Respectfully submitted.

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SEPTEMBER 1943.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1937, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*), are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

U. S. GOVERNMENT PRINTING OFFICE : 1945

(28)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 201.

TROJAN POWDER COMPANY,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR REHEARING.

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TROJAN POWDER COMPANY,
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NATIONAL LABOR RELATIONS BOARD,
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PETITION FOR REHEARING.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Trojan Powder Company petitions for rehearing of its petition for a writ of certiorari, which was denied on October 18, 1943.

For the convenience of the Court, petitioner states, without discussion, the main reasons advanced by it in its petition in support of the writ.

1. The decision of the Court of Appeals for the Third Circuit in the case at bar, *Trojan Powder Company* v. *National Labor Relations Board*, 135 F. (2d) 337, is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *National Labor Relations Board* v. *American Tube Bending Company*, 134 F. (2d) 993.

2. The Circuit Court of Appeals, in the case at bar, erred in holding that it had no authority to interfere with the findings made by the Board. This is so in view of the finding of the Court below that the language used by the petitioner in letters sent to its employees was innocuous and that the evidence was capable of a conclusion either in favor of the petitioner or against it.

3. The facts set forth in these letters, and the statements made, were privileged under the First Amendment of the Constitution of the United States.

ARGUMENT IN SUPPORT OF THE PETITION FOR REHEARING.

Petitioner submits that no consideration was given by the Court below to the constitutional rights of the petitioner under the First Amendment. It suggests that perhaps in the petition for the writ of certiorari, this was not made sufficiently clear.

In *National Labor Relations Board* v. *American Tube Bending Company, supra,* L. Hand, C. J., writing for the Second Circuit, said:

> "The question may be divided into two parts: first, whether the statements in the letter and the speech uttered at that time and under those circumstances could be regarded as coercive at all; second, if so, whether they were privileged under the First Amendment."

Petitioner is in full accord with the above quoted statement. It most earnestly submits, however, that in the case at bar, the Circuit Court of Appeals for the Third Circuit, although the same issue was raised, failed to give any consideration whatsoever to the question of whether the state-

ments or the language used by the petitioner were privileged under the First Amendment.

The failure to give consideration to this question is not a mere academic question. Nor can it be said that the language used and the statements made were of such nature and so obviously not privileged that the Court below felt it unnecessary to consider this question. The Court below made no definite finding that the statements were coercive. It held merely that it could not say that the facts outlined were incapable of sustaining the conclusion of coercion found by the Board.

As can be seen from the Record and from the opinion of the Circuit Court of Appeals, the alleged coercion as found by the Board amounted to nothing more than statements of fact or expressions of opinion. There is no suggestion that any of them constituted threats.

Indeed, the Court below described some of the language as innocuous and the statements made as lacking venom (R. 94, 95-96). In speaking of the letters, the Court said at R. 94 (fol. 104):

> "Much of their language is innocuous and indeed, standing by itself, could hardly receive anything but an innocent interpretation."

Again referring to the letters, at R. 95 (fol. 105):

> "That closes the series of letters. They are carefully worded; certainly, there is no threat explicit in the language used."

In considering the statements made, the Court below said, at R. 95-96 (fol. 106):

> "Except for the last statement, what the supervisory employees said, like the letters, lacks the

> venom found in many other cases, some of them in this Circuit."

The "last statement" referred to in the above quote was purely an expression of opinion by one foreman who was in charge of a small division of the plant.

Neither the Court below nor the Labor Board found that any of the facts stated were obviously false or any opinion expressed to be other than an honest belief.

Certainly, statements of fact or expressions of opinion such as these should be considered privileged.

The failure of the Court below under these circumstances to consider whether they were in fact privileged under the First Amendment constitutes a most serious omission amounting to the deprivation of the petitioner's rights guaranteed to it under the Constitution of the United States.

The Issue Was Properly Before the Court Below.

The Board filed in the Circuit Court of Appeals for the Third Circuit a petition for enforcement of the order of the National Labor Relations Board. R. 72 (fol. 72). In due course, an answer was filed on behalf of the Trojan Powder Company. Paragraph Eighth of this answer reads as follows:

> "The said findings of the Board are an unreasonable interference with Respondent's exercise of its right of free speech as guaranteed by the Constitution of the United States." R. 88 (fol. 96).

There can be no doubt, therefore, that the petitioner herein pleaded its Constitutional privilege. The question of petitioner's rights under the First Amendment was dis-

cussed and argued in the briefs filed on its behalf in the Circuit Court of Appeals.

Despite these facts, as will be seen from the Circuit Court's opinion, no consideration whatsoever was given to petitioner's Constitutional rights. The opinion of the Circuit Court, which begins on page 92 of the Record and ends at the top of page 97, contains not one word dealing with petitioner's rights under the First Amendment. For some reason, the Circuit Court apparently did not consider this an issue in the case. At R. 93, (fol. 103), the Court below said:

> "Whether these findings are supported by substantial evidence is the principal question in the case and indeed the only question except for a minor one concerning the order requiring the posting of notices."

Thus the Court below so confined the issues as to eliminate from consideration petitioner's contention that its Constitutional rights had been violated. Petitioner therefore has in effect been deprived of proper consideration by the Court of its Constitutional privileges.

The order of enforcement contained, among other things, a direction that the petitioner post notices in conspicuous places throughout its plant, stating that it will not engage in conduct from which it was ordered to cease and desist. Such a notice has been posted and is presently on the bulletin board of the Company in accordance with the order.

Petitioner submits that the posting of this notice should not be considered as any waiver of its rights, as the notice was posted to avoid any contention that this petition was being made solely for the purposes of delay.

Petitioner respectfully requests that this Court grant a rehearing so that petitioner may be afforded the opportunity of having its Constitutional rights considered by this Court, or that the case be remanded to the Circuit Court of Appeals for a determination of this issue.

Respectfully submitted,

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KENNETH SOUSER,
ROBERT A. LILLY,
Counsel for Petitioner,
New York, N. Y.

November 10, 1943.

I certify that I am familiar with the contents of the foregoing petition and with the preparation thereof, and that the same is presented in good faith and not for delay.

JAMES H. HERBERT,
New York, N. Y.

November 10, 1943.